No. 02-1028

IN THE

Supreme Court of the United States

NORFOLK SOUTHERN RAILWAY COMPANY,
Petitioner,

v.

JAMES N. KIRBY PTY LTD D/B/A KIRBY ENGINEERING,
MMI GENERAL INSURANCE, LTD.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF OF *AMICUS CURIAE* TRANSPORTATION LOSS PREVENTION AND SECURITY ASSOCIATION IN SUPPORT OF PETITIONER NORFOLK SOUTHERN RAILWAY COMPANY'S PETITION FOR WRIT OF CERTIORARI

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STATEMENT REQUIRED BY RULE 29.6

Pursuant to Rule 29.6 the Transportation Loss Prevention and Security Association states that it is a non-profit corporation incorporated in New Jersey. Its shares are not traded.

STATEMENT OF CONSENT

The parties have consented to the filing of this brief.

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Transportation Loss Prevention and Security Association "TLPSA" is a non-profit corporation incorporated in the State of New Jersey.[1] It is comprised of over sixty-five member organizations which are involved in the transportation of freight by truck within the United States. Members include trucking companies, large and small, some with revenues upwards of $2.5 billion. Its mission as stated in its bylaws is to:

> (1) provide continuing professional education to cargo claims professionals and their insurers, cargo security professionals, and law enforcement; (2) facilitate practical and effective communications between carrier and insurance personnel and law enforcement; (3) engage in legal and legislative advocacy on behalf of the membership.

A majority of its members transport freight to and from domestic locales as a component of continuous through movements in international transportation. As such, they frequently transport freight subject to ocean bills of lading which include Himalaya clauses as well as clauses Paramount. Consequently they are similarly situated to Petitioner Norfolk Southern Railway Company "Norfolk Southern". In fact, it is merely an accident of circumstance that a railroad rather than a trucker was retained to carry the freight in this controversy. Had the freight been bound for a town not served by a rail line, it would have been trucked. In addition, Norfolk Southern was only dispatched to deliver the freight to its rail ramp in Huntsville, Alabama. The ultimate destination was Athens, Alabama, thirty miles west, to which the freight would have eventually been short hauled by a trucker. Constituents of TLPSA include small trucking companies,

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[1] No other person or organization made a monetary contribution to the preparation of this brief.

which, unlike Petitioner Norfolk Southern do not have the financial wherewithal to absorb a $1.5 million judgment. Claims of such magnitude would force numerous truckers out of business. It is the considered opinion of TLPSA not only that the Eleventh Circuit decision is in error, but that if it remains intact it will have a chilling effect upon the willingness of trucking companies to accept import and export freight. TLPSA respectfully requests this Court to grant Norfolk Southern's Petition for Writ of Certiorari.

STATEMENT OF FACTS

There are two facts which TLPSA wishes to underscore.

The first is that the transaction which took place here was a very common one. An overseas freight forwarder made arrangements with an Australian transport company, a steamship company, and finally with a U.S. domestic freight carrier. Therefore, the party who prepared the bill of lading was not in direct privity with Norfolk Southern. Arrangements like these are the norm.[2]

The only shipping documents generated described the cargo as an ocean container "said to contain" technically described machinery.[3] There is no declaration of the value of the cargo and no description which indicates that the cargo was worth one and one-half million dollars. Had the freight been tendered to a trucking company, it would have been able to calculate a freight charge based upon weight and mileage, but would have had no data on which it could base a surcharge for exceptional liability exposure. It also would have no knowledge of the extraordinary value of the cargo it was hauling.

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[2] U.S. Department of Transportation Cargo Liability Study, August 1998, p. 13.

[3] Certiorari Petition, Appendix H.

SUMMARY OF ARGUMENT

The Petition for Writ of Certiorari correctly argues that the decision below ignores controlling maritime precedent and creates an unwarranted and potentially confusing split of authority within the major maritime circuits.

From the perspective of the trucking companies who are represented by TLPSA, the Eleventh Circuit opinion fails to put the issues in proper context because it fails to appreciate the impact of recent deregulation, as well as the previous opinions of the Court germane to brokered freight.

The completely deregulated environment encourages the use of intermediaries to make arrangements between shippers and intermodal carriers. It also favors the presumption that cargo will move pursuant to a limitation of liability save for negotiated terms initiated by the shipper. These policy backdrops from the new deregulated world of transportation have been completely ignored by the lower court.

ARGUMENT

TLPSA does not wish to burden the Court with echoes. Norfolk Southern has ably highlighted the legal shortcomings of the Eleventh Circuit's opinion, as well as the dilution of uniformity within the Circuits and the specter of rampant forum shopping it entails.

Nonetheless TLPSA feels compelled to underscore that the impact of this decision will be contrary to the goals of the National Transportation Policy and the governing law as it has developed in the recently deregulated environment. TLPSA also wishes to call to the Court's attention the fact that even though Norfolk Southern's petition highlights a split between what it calls "primary circuits with maritime jurisdiction", that international intermodal freight of the kind

involved here is trucked into every circuit, including the Tenth and the Federal Circuits, which are the only circuits without a deep water port.

I. THE DECISION IS CONTRARY TO THE PUBLIC POLICY ENCOURAGING THE SEAMLESS USE OF TRANSPORTATION INTERMEDIARIES.

The lower court decision is flatly at variance with the well-established rule that when a shipper uses an intermediary to make its transportation arrangements it consents to be bound by whatever deal the intermediary negotiates.

Surface transportation was subject to pervasive regulation by the former Interstate Commerce Commission ("ICC"). A steady stream of ICC decisions beginning in 1976 as well as deregulatory legislation between 1980 and 1995 effectively morphed surface transportation from a system manipulated by regulators to one which is governed by market forces. Motor Carrier Act of 1980 Pub. Law. 96-296 94 Stat. 793; Trucking Industry Regulatory Reform Act of 1994 Pub. Law. 103-311, 108 Stat. 1683 (1994); Interstate Commerce Commission Termination Act of 1995 Pub. Law. 104-88, 109 Stat. 803 (1995).

This piecemeal deregulation of the freight transportation industry shifted the function of allocating rolling stock resources from the heavy hand of government to the silent arm of the marketplace. Relaxed entry requirements resulted in a proliferation of licensed carriers, so there are now upwards of 55,000 of them[4], many of them truck stop entrepreneurs with fleets comprised of only one, or perhaps a small handful of trucks. In this new milieu the matching of freight with a carrier to haul it is a much more haphazard and

[4] 104 U.S. Code and Administrative News, p. 804 (104th Cong. 1st Sess. 1995)

frenetic enterprise. Among the sidebar consequences of this sea change is the massive proliferation of transportation intermediaries who run the gamut from brokers who mix and match shippers with carriers, sometimes with the benefit of little more than a personal computer and a telephone, to third party logistics providers like GATX which operate as out-sourced traffic departments for large companies.

The ICC recognized and accommodated this shift in the marketplace by promulgating *Ex Parte* No. MC-96 Entry Control of Brokers 126 MCC 476 (1977) which loosened entry restrictions on brokers.

Over the course of the past decade countless intermediaries have entered the marketplace. The Transportation Intermediaries Association, for instance, was nonexistent until 1996 and now boasts over eight hundred active members. In 1980 Congress repealed the prohibition against motor carriers holding dual authority as both carriers and brokers. It is now not only common for freight to be brokered, it is downright common for freight to be rebrokered from entity to entity until a suitable empty truck can be found in the vicinity of the freight heading in the same direction in which the freight is bound.

In such an environment the privity envisioned by the Eleventh Circuit is an almost universal impossibility.

This Court recognized this fact of life long ago and in a much more simplified marketplace when it crafted the rules in *Great Northern Railroad v. O'Connor*, 232 U.S. 508 (1914) and later in *Chicago, Milwaukee, St. Paul & Pacific Railroad v. Acme Fast Freight, Inc.*, 336 U.S. 465 (1949). Simply put, a transportation intermediary stands in the shoes of a carrier *vis a vis* those entities looking to have the freight moved; and it stands in the shoes of a shipper *vis a vis* the entities it hires to move it. And any entity which retains the services of an intermediary is stuck with whatever deal the

intermediary negotiates. These principals are the glue which hold the modern transportation infrastructure together, and numerous lower courts have reaffirmed them in the modern setting. *Kansas City Fire and Marine v. Consolidated Rail Corporation*, 80 F.Supp.2d 447 (1999); *Burnett v. Butler Moving & Storage*, 826 F.Supp. 65 (N.D.N.Y. 1993); *Gulf & Western Ind. v. Old Dominion Freight Line*, 633 F.Supp. 688 (M.D.N.C. 1986).

This Court has also long held that an intermediate, or "downstream" carrier is entitled to avail itself of the same limitation of liability which applies to the initiating carrier. *Kansas City Southern Railway v. Carl*, 227 U.S. 639 (1912).

The Eleventh Circuit's abandonment of these long-standing principles of law and logic will have an immediate and deleterious impact on the nation's commerce.

The law of supply and demand creates a circumstance where the capacity of the country's rolling stock is roughly equivalent to the median amount of freight that needs to be moved. In fact, during the heyday of pervasive regulation, entry into the transportation market was predicated upon a showing that the public convenience and necessity required the services of a new entrant. Moreover, the former I.C.C. ordained the practice of assessing punitive "detention" and "demurrage" charges against shippers who tied up the country's rolling stock and kept it out of the service pool, because it was deemed to be an impediment to commerce.

It stands to reason that small motor carriers and perhaps even larger ones will be extremely reluctant to accept brokered freight from overseas for fear that they will be exposing themselves to a catastrophic loss like that here. As a result, the ability of importers to bring product to market irrespective of its value will be severely impaired and a

precipitous imbalance will obtain between the freight bound to and from U.S. ports and the available rolling stock needed to move it.

Scaring small carriers from the marketplace by exposing them to severe unwitting losses is inimical to the National Transportation Policy originally drafted in 1940 and now codified at 49 U.S.C. §13101(a)(2) which seeks to encourage reasonable rates, efficiency, service to small towns, profitability, and further seeks to promote intermodalism. The Eleventh Circuit's view will only promote higher freight rates and service shortages.

II. THE DECISION UNDERMINES THE RISK ALLOCATION REGIME ORDAINED BY CONGRESS AND WHICH ENCOURAGES THE APPLICATION OF LIMITATIONS ON CARRIER LIABILITY.

Congress has ordained a risk allocation regime which not only permits but endorses limitations on carrier liability. The system is designed to ensure that risk of loss is shared and encourages shippers to avail themselves of private insurance.

Limitations of carrier liability have ancient antecedents and are ubiquitous within the industry.

Limitations of liability serve the public policy function of protecting carriers from huge unforeseen losses and provide flexibility to shippers to decide whether they wish to assume risk themselves in exchange for lower freight rates or pay higher rates in exchange for full value liability by the carrier. These expedients are the logical outgrowth of the plain fact that the shipper is the only party who actually knows the value of its freight. As this Court put it long ago:

> There is no justice in allowing the shipper to be paid a large value for an article which he has induced the carrier to take at a low rate of freight on the assertion

> and agreement that its value is a lesser sum than that claimed after loss. It is just to hold the shipper to his agreement, fairly made, as to value, even where the loss or injury has occurred through the negligence of the carrier.

Hart v. Pennsylvania Railway. Co., 112 U.S. 331, 340 (1884).

Accordingly, the liability of ocean carriers is limited by statute to $500 per shipping unit. Carriage of Goods by Sea Act 46 U.S.C. §1304(5). Limitations of liability in the volume transportation contracts of railroads are routinely upheld. *Cooperative Shippers, Inc. v. Atchison, Topeka & Santa Fe Railway Company*, 840 F.2d 447 (7th Cir. 1988). The liability of international air carriers is limited by treaty to the sum of $9.07 a pound. 49 U.S.C. §40105.

Domestic air freight like that here is governed by federal common law. *Diero v. American Airlines*, 816 F.2d 1360 (9th Cir. 1987). The law permits carriers to establish unilaterally limitations of liability which are routinely enforced when the plaintiff had reasonable notice of the limitation. *Diero v. American Airlines, supra*, p. 1365, *Reece v. Delta Airlines, Inc.*, 731 F. Supp. 1131, (D. Me. 1990).

No doubt hundreds of shipments arrive for filing at this very Court which are routinely subject to these limitations.

Domestic surface transportation was pervasively regulated by the Interstate Commerce Commission throughout the bulk of the last century. Trucking companies were regulated in the manner of public utilities. Rates were subject to challenge by competitors and the Commission reserved the right to require truckers to prove the reasonableness of their rates by presenting elaborate cost analyses. Carriers could only charge the rates they had on file with the Commission and unpublished discounts were strictly forbidden. *Maislin Industries v. Primary Steel*, 497 U.S. 116 (1990).

However, the Carmack Amendment to the Interstate Commerce Act as modified by the Cummins Amendment of 1916, specifically provided that carriers could offer a menu of published discount rates provided that the shipper was willing to accept a limited liquidated cap on the carrier's liability. The inherent equities of this arrangement have long been lauded by this Court:

> The underlying principle is that the carrier is entitled to base rates upon value and that its compensation should bear a reasonable relation to the risk and responsibility assumed. The broad purpose of the federal act is to compel the establishment of reasonable rates and to provide for their uniform application.

Southeastern Express Co. v. Pastime Amusement Co., 299 U.S. 28, 29, 57 S. Ct. 73, 81 L.Ed. 20 (1936). Accord: *Missouri, K&T.R. Co. v. Harriman Brothers*, 227 U.S. 657 (1913).

In fact, the only recognized exception to limitations of carrier liability was the circumstance where carriers deliberately converted the freight to their own use. *American Cyanamid v. New Penn Motor Express, Inc.*, 979 F.2d 310 (3rd Cir. 1992).

Over time a four-part test evolved within the case law which provided lower courts with the leverage to interject equitable considerations into such cases on an *ad hoc* basis. In order to establish limitations of liability carriers were required to:

- Maintain a filed tariff in accordance with ICC regulations;
- Give the shipper-consignor a reasonable opportunity to choose between two or more levels of liability;
- Obtain the shipper-consignor's agreement as to the choice of liability; and

- Issue a bill of lading or receipt prior to the shipment of the goods.

New York, New Haven & Hartford Railroad v. Nothnagle, 346 U.S. 128 (1953).

This test proved far less rigid than it appears. Filed tariffs were legally required, as was the uniform domestic bill of lading. Given that shippers were deemed to be on constructive notice of the rate menus in the carriers' filed tariffs, the middle prongs of the test were low hurdles. Eventually parallel lines of case law developed where the standard was applied narrowly in the case of commercial shippers but applied less rigidly for shippers of household goods and mom and pop enterprises. Despite the lack of any statutory mandates, the relative "sophistication" of the shipper became a criterion for decision in limitation of liability cases.

In 1977 the I.C.C. promulgated Released Rates Order No. MC 894, 353 I.C.C. 661 (1977) which endorsed the practice of carriers establishing by tariff rule that a shipper's omission to declare the value of its freight automatically resulted in the freight being transported at the lowest rate along with the concomitantly lower limitation of liability. The petitioner in that proceeding was a major shipper, IBM, which was having trouble distributing high value mainframe computers because carriers were reluctant to haul such expensive merchandise. That decision crystallized the overriding policy rationale supporting the limited liability regime: In order to protect motor carriers from catastrophic losses, and to allow shippers the flexibility to manage their risk as they see fit, the I.C.C. ordained a liability regime which shifted the burden for extraordinary losses to private insurers whose premium pool was far more widespread.

In 1994 Congress passed the Trucking Industry Regulatory Reform Act Pub. Law 103-311 (1994) which eliminated the

tariff filing requirement without considering the impact that the abandonment of the constructive notice doctrine would have on the limited liability regime.

When the issue was revisited with the passage of ICCTA in 1995 Congress adopted the following provision which placed a duty of inquiry upon the shipper to ascertain whether a quoted rate was tied to a limited liability provision:

> A motor carrier of property shall provide to the shipper, *on request of the shipper*, a written or electronic copy of the rate, classification, rules and practices upon which any rate applicable to its shipment or agreed to between the shipper and carrier is based.

49 U.S.C. §13710(a). (Underscore supplied.)

Thus Congress chose to replace the constructive notice regime with a system that placed the burden of inquiry on the shipper, rather than placing the burden of disclosure on the carrier.

ICCTA also directed that the Department of Transportation generate a cargo liability study summarizing the policies underlying the limitations governing the various modes and exploring the likelihood of harmonizing them. Among the DOT's findings and recommendations were these:

> Since enactment of TIRRA and ICCTA, shippers have complained about not knowing the limits of liability established by motor carriers. Sec. 10706 of title 49, United States Code, provides that, "upon request of the shipper," the carrier shall provide written or electronic notice of the rate, classification, rules, and practices on which the applicable price for the carriage is based. The nature of notice was altered. As a result, shippers can no longer be presumed to know the rate which the carriers maintain in their own filing systems, even when that system is open to the shippers upon request. The legal significance is that shippers can no longer be charged with constructive notice of the limitation. The shippers'

ability to participate in establishing a *reasonable* limitation was weakened when rate filing with ICC disappeared. Moreover, the independent arbitration of reasonableness which had been available through ICC disappeared. The carriers are now more or less free to limit their liability to any level they choose.

Department of Transportation Cargo Liability Study 1998, p. 33.

8.4 INSURANCE COVERAGE

Discussion: In domestic transportation, shippers currently carry a major portion of the risk of carriage, whether due to the effect of carriers' defenses to liability, because of unfiled claims, because shippers have agreed to less than full value liability, because of released rates, because carriers are unable to compensate due to bankruptcy, or due to carriers' simple refusal to make payment. Domestic shippers are exposed to a substantial risk which they should consider covering by cargo insurance in the same way that they cover their transportation risk in international carriage. Insurance to cover these risks is readily available and at reasonable cost.

Recommendation: Shippers are encouraged to cover their transportation risk exposure by cargo insurance. The existing insurance system appears adequate to serve shippers and carriers and there has been no suggestion that insurance is unavailable. A legislative or regulatory solution is not needed in this area.

Id p. 59.

While taking these steps to endorse a risk allocation scheme which burdens shippers' insurers while permitting carriers to avail themselves of limitations of liability, neither Congress nor the Department of Transportation took steps to amend 49 C.F.R. 387.303(c) which mandates that carriers need only maintain cargo insurance up to $10,000 per occurrence.

At first blush, this may seem somewhat lopsided. However, as the DOT Cargo Liability Study concluded based upon the evidence presented to it ninety percent of all freight that moves is valued at less than $10 a pound. *Id* p. 26. Therefore limitations of liability only protect carriers from extraordinary losses, and rarely absolve them from being answerable for loss or damage they may cause.

Thus, the public policy rationale which favors limitations of liability in air, and water transportation is likewise embraced in the sphere of domestic surface transportation.

CONCLUSION

Amicus curiae respectfully request that Norfolk Southern's Petition for Writ of Certiorari be granted.

Respectfully submitted,

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